

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 27 1996

In the Matter of)

Implementation of the)
Telecommunications Act of 1996:)

Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other)
Customer Information)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC Docket No. 96-115

DOCKET FILE COPY ORIGINAL

**BELLSOUTH MOTION TO STRIKE COMMENTS OF THE
ASSOCIATION OF TELEMESSAGING SERVICES INTERNATIONAL (ATSI)
OR IN THE ALTERNATIVE
MOTION FOR LEAVE TO FILE RESPONSIVE PLEADING**

BellSouth Corporation, on behalf of BellSouth Enterprises, Inc., BellSouth
Telecommunications, Inc., and their affiliated companies ("BellSouth"), hereby submits this
Motion To Strike Comments Of The Association Of Telemessaging Services International
("ATSI"), or in the Alternative, Motion For Leave To File Responsive Pleading.

The Commission initiated this proceeding on May 17, 1996,¹ proposing to clarify
obligations of telecommunications carriers with respect to use and protection of customer
proprietary network information ("CPNI") under Section 222² of the Communications Act.³ In

¹ Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221 (May 17, 1996)
("Notice").

² 47 U.S.C. § 222.

³ 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No.
104-104, 110 Stat. 56 (the "1996 Act").

No. of Copies rec'd 02/12
List A B C D E

the Notice, the Commission established June 11, 1996, as the deadline for filing initial Comments and June 26, 1996, as the deadline for Reply Comments. Forty-three parties timely filed Comments, and thirty-two parties timely filed Reply Comments. ATSI filed neither. Instead, ATSI filed its Comments on August 26, 1996, more than sixty days after the close of the pleading cycle established by the Commission and seventy-five days after original comments were due.⁴ Accordingly, BellSouth urges the Commission to strike ATSI's Comments from the record of this proceeding as unauthorized and untimely filed. In the alternative, BellSouth requests leave to file a responsive Reply.

I. Motion to Strike

ATSI has plainly failed to conform to the most basic rules of procedure adopted by the Commission for submitting pleadings in rulemaking proceedings. The Commission's rules state:

A reasonable time will be provided for submission of comments in support of or in opposition to proposed rules . . . [and] for filing comments in reply to the original comments, and the time provided will be specified in the notice of proposed rulemaking. . . . No additional comments may be filed unless specifically requested or authorized by the Commission.⁵

ATSI failed to file its comments within the reasonable time provided by the Commission in the Notice in the first instance, and compounded its deficiency by failing to obtain Commission authorization to submit its filing outside that time period. Accordingly, ATSI's comments must be stricken from the record in this proceeding.

⁴ A copy of the cover page of ATSI's filing clearly showing the date stamp of the Office of the Secretary and confirming that ATSI's comments were received by the Commission on August 26, 1996, is included as Attachment A, hereto.

⁵ 47 C.F.R. §1.415.

ATSI's failure to file within the same time constraints as all other interested parties in this proceeding is baffling, at best. ATSI has offered no explanation of its need to file more than sixty days outside of the time established in the Notice. ATSI did not submit any request for extension of the original filing deadlines,⁶ nor did it submit a request for leave to file out of time. Nor does anything in the substance of ATSI's comments suggest any reason ATSI could not have compiled its comments within the time allotted all other parties. Acceptance by the Commission of ATSI's comments at this point would render meaningless the filing deadlines imposed by the Commission. Absent some *compelling* justification for what otherwise appears to be a flagrant disregard of the Commission's rules and processes, the Commission should reject ATSI's filing as procedurally inappropriate.

Moreover, even in making its late filing, ATSI failed to serve counsel for BellSouth with a copy of its filing. Additionally, from the absence of a certificate of service appended to its filing, it appears that ATSI similarly failed to serve other interested parties. Of course, the Commission's rules contain no express requirement that parties be served with late-filed comments, but that is principally because the Commission's rules do not contemplate that comments will be filed in this manner. Both common sense and common courtesy should have suggested to ATSI that parties likely to be affected (and, indeed, parties ATSI intends to be affected) by its comments would have an interest in reviewing ATSI's position. Certainly, the public notice and comment procedures established by the Commission are designed to ensure that

⁶ Indeed, even had ATSI requested an extension of time in which to file comments, it is not likely that such a request would have been granted. 47 C.F.R. § 1.46 ("It is the policy of the Commission that extensions of time shall not be routinely granted.") ATSI should not be awarded the luxury of filing late on its own initiative, and without justification, when it is unlikely that the Commission would have allowed such late filing if requested in advance.

they have the opportunity to do so. ATSI's attempt to slip late-filed comments unnoticed into the Commission's record directly contravenes that objective and should not be countenanced.

Nor can ATSI claim its filing is a permitted written *ex parte* communication. Section 1.419(b) of the Commission rules provides that "[i]nformal comments filed after close of the reply comment period . . . should be labeled 'ex parte' pursuant to section 1.1206(a) of this Chapter."⁷ Section 1.1206(a)(1) provides, in turn, that a written *ex parte* presentation "must be labeled or captioned as an ex parte presentation."⁸ That section also requires the presentation to meet other filing requirements designed to put the Commission on notice of the nature of the filing so that the Commission can meet its obligations under Section 1.1206(a)(4) to make the public aware of the written presentation. ATSI's filing clearly is not labeled or captioned as an ex parte presentation, contrary to the requirements of Section 1.1206(a)(1). From the absence of any public notice of ATSI's filing from the Commission, it appears that ATSI also failed to meet its obligation to inform the Commission of the ex parte nature of its written presentation.⁹ Accordingly, ATSI is unable to cure its originally defective pleading through resort to after-the-fact recharacterization of the filing as a written ex parte communication.

⁷ 47 C.F.R. § 1.419(b).

⁸ 47 C.F.R. § 1.1206(a)(1).

⁹ The only indication of an ex parte contact by ATSI to appear in the Commission's routine Public Notice of ex parte contacts appeared on September 3, 1996, referencing an ex parte communication on August 26, 1996. On that date, the Commission received from ATSI a written confirmation (dated August 20, 1996) of an oral ex parte communication that occurred on August 20, 1996, and in which ATSI merely indicated an intent to file written comments "in the near future". See Attachment B, hereto. It is apparent that the August 20 letter from ATSI is the ex parte communication to which the Public Notice refers since the letter is properly labeled as an ex parte communication and was stamped on receipt by the Commission on August 26 as such. Neither the Public Notice by the Commission nor ATSI's own letter, however, provides any notice of the actual filing of ATSI's written comments, principally because ATSI failed to follow the Commission's requirements for submitting written ex parte presentations.

Finally, the Commission must be skeptical of ATSI's likely response to this Motion: *i.e.*, that the Commission will benefit from a more complete record in this proceeding, or something to that effect. To the contrary, ATSI's comments, to a large extent, do little more than re-hash issues the Commission has previously considered and rejected when adopting CPNI rules prior to the 1996 Act. Indeed, ATSI merely encourages the Commission to pay even less attention to consumers' privacy expectations than it has in the past in an effort to "rebalance" the competitive equities associated with CPNI. Encouragement of such total disregard for Section 222's overarching emphasis on consumer expectations provides little contribution to the Commission's analysis in this docket.¹⁰

¹⁰ Lest ATSI attempt to argue that its comments must be of some substantial value or BellSouth would not be opposing its inclusion in the record, the Commission should consider two points. First, to the extent ATSI has any value to contribute to the Commission's deliberative process, ATSI must be bound by the same rules of procedure as every other party who has contributed to that process. Disregard of those procedures should cost ATSI its right to participate in that process, not result in special filing privileges. Second, and perhaps more important, ATSI has advocated in the *Telemessaging Safeguards* proceeding, *Implementation of the Telecommunications Act of 1996; Telemessaging, Electronic Publishing, and Alarm Monitoring Services, Notice of Proposed Rulemaking*, CC Docket No. 96-152, FCC 96-310 (released July 18, 1996), that the expedited complaint procedures the Commission adopts under Section 260 of the Act should impose little procedural burden on complaining parties and should not require the complaining party to engage in much "preparatory work" before lodging a complaint against a local exchange carrier (LEC). ATSI Comments, CC Docket No. 96-152, at 7-13. ATSI also asks that it be permitted to file complaints on behalf of telemessaging providers generally. ATSI Comments, CC Docket No. 96-152, at 8. ATSI's inability in this proceeding to meet even the most fundamental rules of fair process in rulemaking proceedings (e.g., filing deadlines) creates substantial concern as to what ATSI contemplates would be the appropriate standard to govern its practices if the Commission were to adopt ATSI's proposals for Section 260 complaints. Thus, regardless of any claim of substance to ATSI's filing in the instant proceeding, the Commission should use this opportunity to send ATSI a strong message that the Commission's procedural rules are and will be designed to protect the rights of all parties and that neither neglect nor ATSI's status as an industry trade association will excuse it from basic standards of fairness in proceedings before the Commission.

Nor will it be satisfactory for ATSI to suggest that no harm will be done if other parties are permitted to respond to its filing as BellSouth is requesting to do. Accommodation of such after the fact mechanisms for redressing ATSI's own failure to abide by the rules imposes burdens on the Commission as well as the parties. Of course, any burdens arising from ATSI's failure to meet the filing requirements should fall squarely on ATSI, not on the Commission or other interested parties. Such an accommodation in effect allows one party to dictate when there will be an additional round of pleadings simply by withholding comments until well after the official pleading cycle has closed. Moreover, the introduction of an additional pleading cycle at this late stage is unfair to parties who have been awaiting the Commission's interpretation of an otherwise self-effective provision of the Act.¹¹ Rather than allowing ATSI's schedule to dictate that of the Commission or otherwise to introduce unwarranted delays, the Commission should strike ATSI's filing.¹²

In summary, because of ATSI's failure to meet the filing requirements, because of its failure to seek authorization to file out of time, because of its failure to meet the Commission's ex parte rules, because of its failure to add materially to the Commission's analysis in this proceeding, and because of the unfair burden ATSI's noncompliance imposes on other parties and the Commission, BellSouth moves the Commission to strike ATSI's filing from the record of this proceeding.

¹¹ To be sure, BellSouth does not want another pleading cycle. BellSouth's alternative motion below is presented only in the case ATSI can somehow justify its more than sixty day delay in filing its comments.

¹² In contrast, ATSI is not likely to suffer any material harm if the Commission excludes its comments from this proceeding. ATSI's argument is substantially the same as it has been for years.

II. Alternative Motion for Leave to File Responsive Reply

If the Commission should decide, notwithstanding the foregoing, to accept ATSI's filing as part of the record in this proceeding, BellSouth respectfully requests the Commission also to accept BellSouth responsive reply, filed contemporaneously herewith.

As shown above, ATSI has failed to meet even the most basic of filing requirements in rulemaking proceedings. Those requirements are intended not only to give the Commission the benefit of interested parties' comments, but also to give interested parties an opportunity to review and respond to other parties' positions should they so choose. The inclusion of deadlines in these requirements also provides parties a common understanding of the time period in which other parties may be submitting comments that may merit a response. Through this mechanism, the Commission both ensures that it will have a thorough record and provides parties with an appropriate degree of certainty regarding the timing of material contributions to that record.

The unfortunate consequence of one party's failure to comply with those rules is that, absent special authorization to respond, other parties may be denied the procedural rights the Commission's rules are intended to provide. Accordingly, pursuant to Section 1.415(d) of the Commission's rules, BellSouth hereby respectfully requests that, if the Commission allows ATSI's late-filed comments to be included in the record of this proceeding, the Commission also accept BellSouth's responsive Reply, filed herewith.

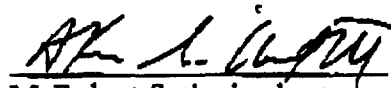
CONCLUSION

For the foregoing reasons, the Commission should strike ATSI's late-filed comments from the record of this proceeding. Alternatively, the Commission should grant BellSouth leave to file a response.

Respectfully submitted,

BELLSOUTH CORPORATION

By Its Attorneys

A handwritten signature in dark ink, appearing to read "M. Robert Sutherland", is written over a horizontal line.

M. Robert Sutherland
A. Kirven Gilbert III

Suite 1700
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610

(404) 249-3388

DATE: September 27, 1996

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

AUG 26 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996:)
)
Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other)
Customer Information)

CC Docket No. 96-115

DOCKET FILE COPY DUPLICATE

Comments of the Association of
Telemessaging Services International

ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL (ATSI)

Frank Moore
Smith, Bucklin & Associates, Inc.
Government Affairs Division
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5100

Its Regulatory Counsel

Herta Tucker
Executive Vice President
Association of Telemessaging Services International
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5151



ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL, INC.

1200 19TH STREET, N.W.
WASHINGTON, D.C. 20036-2412
(202) 428-5151
FAX (202) 223-4579

EX PARTE OR LATE FILED

AUG 26 1996

RECEIVED

August 20, 1996

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentations, CC Docket No. 96-115

Dear Mr. Caton:

On August 20, 1996, Frank Moore, serving as regulatory counsel for the Association of Telemessaging Services International (ATSI), met with Radhika Karmakar, Blaise Sciento, Jeannie Su and Bill Kehoe of the Common Carrier Bureau to discuss ATSI's concerns regarding CPNI. ATSI will submit written comments to the Commission in the near future.

Sincerely,

A handwritten signature in cursive script that reads 'Herta Tucker'.

Herta Tucker
Executive Vice President

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th September, 1996 served the following parties to this action with a copy of the foregoing **BELLSOUTH MOTION TO STRIKE COMMENTS OF THE ASSOCIATION OF TELEMESSAGING SERVICES INTERNATIONAL (ATSI) OR IN THE ALTERNATIVE MOTION FOR LEAVE TO FILE RESPONSIVE PLEADING** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.



Sheila Bonner

CC DOCKET NO. 96-115

Cincinnati Bell Telephone Company
FROST & JACOBS
Thomas E. Taylor
Jack B. Harrison
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

SBC Communications Inc.
James D. Ellis
Robert M. Lynch
David F. Brown
175 E. Houston, Room 1254
San Antonio, TX 78205

Southwestern Bell Telephone Company
Durward D. Dupre
Michael J. Zpevak
Robert J. Gryzmala
One Bell Center, Room 3520
St. Louis, Missouri 63101

NYNEX Telephone Companies
Saul Fisher
Thomas J. Farrelly
1095 Avenue of the Americas
New York, NY 10036

The Bell Atlantic Telephone Companies
Lawrence W. Katz
1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201

Ameritech
Alan N. Baker
Michael S. Pabian
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196

Virgin Islands Telephone Corporation
Reed Smith Shaw & McClay
Jonathan E. Canis
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005

Sprint Corporation
Jay C. Keithley
Leon M. Kestenbaum
Norina T. Moy
1850 M Street, N.W.
Suite 1110
Washington, D.C. 20036

Craig T. Smith
Sprint Corporation
P. O. Box 11315
Kansas City, Missouri 64112

U S West, Inc.
Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036

ALLTEL Corporate Services, Inc.
Glenn S. Rabin
655 15th Street, N.W.
Suite 200
Washington, D.C. 20005

United States Telephone Association
Mary McDermott
Linda Kent
Charles D. Cosson
Keith Townsend
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

NYNEX Telephone Companies
Saul Fisher
Thomas J. Farrelly
1095 Avenue of the Americas
New York, NY 10036

Frontier Corporation
Michael J. Shortley, III
180 South Clinton Avenue
Rochester, NY 14646

Pacific Telesis Group
Lucille M. Mates
Sarah R. Thomas
Patricia L. C. Mahoney
140 New Montgomery Street
Room 1522A
San Francisco, CA 94105

Pacific Telesis Group
Margaret E. Garber
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

GTE Service Corporation
Richard McKenna
600 Hidden Ridge
Irving, Texas 75015

GTE Service Corporation
David J. Gudino
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

National Association of Regulatory Utility
Commissioners
Paul Rodgers
Charles D. Gray
James Bradford Ramsay
1201 Constitution Avenue, Suite 1102
Post Office Box 684
Washington, D.C. 20044

Assemblyman Anthony J. Genovesi
Legislative Office Building
Room 456
Albany, NY 12248-0001

People of the State of California and the Public
Utilities Commission of the State of California
Peter Arth, Jr.
Edward W. O'Neill
Mary Mack Adu
505 Van Ness Avenue
San Francisco, CA 94102

Pennsylvania Office of Consumer Advocate
Philip F. McClelland
Irwin A. Popowsky
Office of Attorney General
1425 Strawberry Square
Harrisburg, PA 17120

Public Utility Commission of Texas
Jackie Follis,
Senior Policy Analyst
Office of Regulatory Affairs
7800 Shoal Creek Boulevard
Austin, TX 78757-1098

American Public Communications Council
DICKSTEIN, SHAPIRO & MORIN, L.L.P.
Albert H. Kramer
Robert F. Aldrich
2101 L Street, N.W.
Washington, D.C. 20554

Yellow Pages Publishers Association
Halprin, Temple, Goodman and Sugrue
Albert Halprin
Joel Bernstein
1100 New York Avenue, N.W.
Suite 650E
Washington, D.C. 20005

Association of Directory Publishers
Theodore Case Whitehouse
Michael F. Finn
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Small Business in Telecommunications
Brown and Schwaninger
Dennis C. Brown
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006

Consumer Federation of America
Bradley Stillman, Esq.
1424 16th Street, N.W.
Suite 604
Washington, D.C. 20036

The Alarm Industry Communications Committee
KELLEY DRYE & WARREN, LLP
Danny E. Adams
Steven A. Augustino
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036

CompuServe Incorporated
5000 Arlington Centre Boulevard
P. O. Box 20212
Columbus, OH 43220

CompuServe Incorporated
SUTHERLAND, ASBILL & BRENNAN
Randolph J. May
Bonding Yee
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404

Information Technology Association of America
Squire, Sanders & Dempsey
Joseph P. Markoski
Marc Berejka
1201 Pennsylvania Avenue, N.W.
P. O. Box 407
Washington, D.C. 20044

Personal Communications Industry Association
Mark J. Golden
Vice President of Industry Affairs
500 Montgomery Street
Suite 700
Alexandria, VA 22314-1561

AirTouch Communications, Inc.
David A. Gross
Kathleen Q. Abernathy
1818 N Street, N.W.
Suite 800
Washington, D.C. 20036

AirTouch Communications, Inc.
Pamela Riley
One California Street
San Francisco, CA 94111

Arch Communications Group, Inc.
PAUL, HASTINGS, JANOFISKY & WALKER
Carl W. Northrop
Christine M. Crowe
1299 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004-2400

Paging Network, Inc.
REED SMITH SHAW & McCLAY
Judith St. Ledger-Roty
Lee A. Rau
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005

Cable & Wireless, Inc.
Ann P. Morton, Esq.
8219 Leesburg Pike
Vienna, Virginia 22182

America's Carrier's Telecommunication Association
Helein & Association, P.C.
Charles H. Helein
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102

MCI Telecommunications Corporation
Frank W. Krogh
Donald J. Elardo
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Excel Telecommunications, Inc.
J. Christopher Dance
Vice President, Legal Affairs
Kerry Tassopoulos
Director of Government Affairs
9330 LBJ Freeway, Suite 1220
Dallas, Texas 75243

Excel Communications, Inc.
LAW OFFICES OF THOMAS K. CROWE, P.C.
Thomas K. Crowe
2300 M Street, N.W.
Suite 800
Washington, D.C. 20037

AT&T Corp.
Mark C. Rosenblum
Leonard J. Cali
Judy Sello
Room 3244J1
295 North Maple Avenue
Basking Ridge, NJ 07920

The Competitive Telecommunications Association
Genevieve Morelli
Vice President and General Counsel
1140 Connecticut Avenue, N.W.
Suite 220
Washington, D.C. 20036

The Competitive Telecommunications Association
KELLEY DRYE & WARREN LLP
Danny E. Adams
Steven A. Augustino
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

Telecommunications Resellers Association
HUNTER & MOW, P.C.
Charles C. Hunter
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

WORLDCom, INC.
d/b/a LDDS WorldCom
Catherine R. Sloan
Richard L. Fruchterman
Richard S. Whitt
1120 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036

Intelcom Group (U.S.A.), Inc.
Cindy Z. Schonhaut
Vice President, Government Affairs
9605 East Maroon Circle
Englewood, CO 80112

IntelCom Group (U.S.A.), Inc.
DICKSTEIN, SHAPIRO & MORIN, L.L.P.
Albert H. Kramer
Robert F. Aldrich
2101 L Street, N.W.
Washington, D.C. 20554

Teleport Communications Group, Inc.
Teresa Marrero
Senior Regulatory Counsel
One Teleport Drive
Suite 300
Staten Island, NY 10310

MFS Communications Company, Inc.
David N. Porter
Vice President, Government Affairs
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

MFS Communications Company, Inc.
SWIDLER & BERLIN, Chartered
Andrew D. Lipman
Mark Sievers
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Association of Teleessaging Services International
Herta Tucker
Executive Vice President
1200 19th Street, N.W.
Washington, D.C. 20036

Association of Teleessaging Services International
Smith, Bucklin & Associates, Inc.
Frank Moore
Government Affairs division
1200 19th Street, N.W.
Washington, D.C. 20036